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No. 733

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

MOLLIE DARR, Administratrix of the Estate of KURT DARR, Deceased,

Petitioner,

vs.

HARRIET M. ATLASS AND CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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DARR WAS NOT INTOXICATED.

With flagrant disregard for factual accuracy, the respondents begin their reply as follows: (page 2, Reply)

> "The leading facts are not complicated. They are not disputed any more. *Two* men got drunk, one of them so helplessly drunk that he could not stand

> up if he were not held up whether it was noon or midnight. He fell, first in the street when two men were trying to hold him up, and a few minutes later off a shipyard's dock; whereupon *the other intoxicated man* (then the only one trying to hold him up), jumped in after him because, *as the trial court observed, he also was drunk,* and both drowned." (emphasis throughout ours)

Nothing could be more misleading than the above respondents' statement wherein it is stated that the *trial court* characterized Darr as being "*drunk*" immediately prior to the tragedy in controversy.

On April 17, 1964, the trial court judge made the following remark as a result of a colloquy with counsels Liebenson and Yowell: "* * * But I am satisfied that Darr was not sober, in the *cold stone sense* at the time, * * *." (App. 61)

Thereafter, on June 12, 1964, the same trial judge entered his findings of fact including #40, which pertains to Darr's imbibing and reads as follows: (Pet. #733, App. 24A)

> "40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. *Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr.* Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death." (Emphasis throughout ours)

Almost two months elapsed between the trial court's remarks regarding Darr's sobriety, qualified with the

words, "*in the cold stone sense*", and the same court's official finding of fact #40 supra.

In reflecting the meaning of *sobriety* as qualified by the trial court supra, one is somewhat forced into conjecture to determine the trial court's exact meaning. Sober, "*in the cold stone sense*" can only mean that one has not ingested as much as one alcoholic beverage. Once ingestion of any alcoholic beverage has taken place, the subject can no longer be regarded as sober "*in the cold stone sense*". Therefore, to qualify as being sober "*in the cold stone sense*" can only mean *complete abstinance* from any form of alcoholic beverage.

What constitutes intoxication is excellently illustrated in Richard E. Erwin's, "Defense of Drunk Driving Cases" (Sec. 13.04, pages 161-163).

It would appear that the following poetic reference is appropo:

> "Not drunk is he who from the floor
> Can rise alone and still drink more;
> But drunk is he, who prostrate lies,
> Without the power to drink or rise."
>
> "The Misfortunes of Elphin" (1829)
> Chapter 3
> Translated from the Welsh by Thomas Love Peacock
> (1785-1866)

Nevertheless, applying the intendment most favorable to claimant-appellant Darr's position, based on all the evidence in the record, leaves the inescapable conclusion that *Darr was not intoxicated* immediately prior to the tragedy in question.

It is not denied that Darr, to an *unknown degree,* imbibed immediately prior to the tragedy; however,

mere imbibing is not proof of intoxication. According to the record, Darr could not possibly have done all the things he did immedately prior to his drowning, had he been intoxicated.

Further reference regarding Darr's intoxication is made when the court below (CA-7) refers to Darr "*in a staggering condition*" (Pet. #733, App. 7A), meaning "*staggering drunk*".

This reference is most misleading, unfortunate and based on a misconception. There is no evidence in the *entire* record to justify such an untruth, and neither does the respondent refer to the record of the trial court for substantiation any more than the court below (CA-7) did in rendering its opinion. (There was *no new evidence* presented to the court below, supra, on appeal from the trial court).

The record discloses the following evidence relative to *Darr's staggering*; Smith, a *hostile* witness, testified that when they (Muth, Darr and Smith) got out on the dock, Muth and Darr were not walking O.K.—*Darr was trying to hold Muth up to keep him from staggering too much.* (Tr. 720, App. 52).

*Elsie Gifton, a bar maid, in her evidence deposition, stated that she saw 3 men on the street at approximately 2:30 A.M. on October 26, 1956, through a saloon window,

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* Elsie Gifton admitted that a Mr. Simpson called on her on 3 different occasions to discuss this matter (H. J. Simpson, 135 S. LaSalle St., Chicago 3, Illinois, Room 2500—new phone #346-7475. According to Sullivan's Law Directory, 1963-1964, page 150, this is the office of Edward B. Hayes, attorney for appellee.) (TR. 961, 964 App. 37, 38). She further admitted that the night prior to her evidence deposition one of the counsel for Atlass went over her testimony and a number of questions were written down at the time. (TR. 965 App. 39.

while peering into the darkness of the early morning hours and that she recognized one of them as being Smith; that he was in the middle trying to hold up a man on each side of him; that the two men, other than Smith, appeared drunk. She could not describe the men and her testimony was inconsistent with the testimony of all other witnesses, including Smith (App. 33-43). Elsie testified without benefit of visual accuracy, breath odor, condition of speech, coordination and so forth.

The trial court obviously gave little if any credence to Elsie's deposition as evidenced by said court's findings of fact. Even the respondents in their reply, "* * * He fell, first in the street when *two men were trying to hold him up,* and a few minutes later off a shipyard's dock."; (page 2, Reply) refused to take Elsie's testimony seriously as the "*two men*" *referred to are Smith and Darr.*

Therefore, if Darr was *staggering,* he was not doing so because of *intoxication* but only from the *burden of keeping Muth from falling off of his feet.* After all, Darr was slender and light in weight (135-140 pounds), whereas Muth was stocky and weighed more (165-170 pounds).

There is no doubt that after Atlass temporarily left for Chicago and placed Johnson, his agent in charge, that under the circumstances it was difficult to keep the crew happy and satisfied under the trying conditions then existing, and this becomes more obvious when we note that one of the crew members quit. After all, living without mess facilities, in cold, unheated sleeping quarters with no toilet facilities in said quarters, and with no hot water for bathing or shaving because the yacht (crew's living quarters) was on a marine rail was not exactly a reason for the crew members to become ecstatic.

Nevertheless, it was improper for Johnson, as Atlass' agent in charge, in his zealous effort to keep the crew intact and happy, to indulge the crew members with alcoholic beverages during this period of inconvenience at an intermediate port while the employer's vessel was undergoing minor repairs. Therefore, (1) Darr was not intoxicated and, (2) he had some alcoholic beverages prior to the tragedy; however, (3) indulgence in alcoholic beverages is not of itself proof of intoxication, and (4) if Darr was staggering, it was not from intoxication but from the burden of keeping a helplessly intoxicated Muth on his feet. It therefore appears that respondents sole purpose in filing a single reply to Petitions #709 and #733 is to paint *both* Muth and *Darr* with the same brush, labeling them *intoxicated* contrary to the *trial court's findings.*

The decision of the court below (CA-7) somewhat reminds us what Jonathan Swift said about lawyers in 1727: (Gullivers Travels, "A Voyage to Houyhnhnms" Chapter V)

> "It is a maxim among these lawyers, that whatever hath been done before, may legally be done again; and therefore they take special care to record all the decisions formely made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and they are so lucky in this practice, that it rarely fails of decrees answerable to their intent and expectation."

The field of maritime personal injuries for the past two decades has offered an excellent refutation of Swift's observations simply because the tendency of the courts has been to liberalize the applicable rules in order that

unjust and equitable results will not inure to the injured victim; especially is this true of *remedial legislation* such as the Jones Act (Title 46 U.S.C.A., Sec. 688).

Wherefore, petitioner prays for the relief requested in her original petition.

Respectfully submitted,

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